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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554



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| In the Matter of | ) | |
| Federal-State Joint Board on | ) | CC Docket No. 96-45 |
| Universal Service | ) | |

# TIME WARNER COMMUNICATIONS HOLDINGS, INC. OPPOSITION TO AND COMMENTS ON PETITIONS FOR RECONSIDERATION AND CLARIFICATION OF REPORT AND ORDER

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## SUMMARY

Time Warner Communications Holdings, Inc. ("TW Comm") respectfully submits its Opposition to and Comments on certain petitions for reconsideration and clarification of the Report and Order in CC Docket No. 96-45 (released May 8, 1997), summarized, 62 Fed. Reg. 32,862 (June 17, 1997), recon. in part, FCC 97-246 (released July 10, 1997)("Report and Order"), which adopted rules necessary to implement Section 254 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

- TW Comm opposes suggestions that the Commission adopt approaches that would further extend universal service support to carriers that do not incur the costs of providing universal services. Consistently, TW Comm supports requests that the Commission reconsider its definition of the level of facilities needed to qualify as an eligible telecommunications carrier. The Commission must do so to ensure that only those carriers incurring costs related to the provision of universal service qualify for universal service support.

- TW Comm opposes suggestions made in certain petitions for reconsideration that criteria for federal universal service support eligibility should be determined by individual state public utility commissions. It is unlikely that such an approach would foster competition.

- TW Comm suggests that the Commission refrain from increasing the federal share of universal service support, as urged by many petitioners, unless the funding base for the federal program is increased.

- TW Comm agrees with the suggestion that contributions to universal service support should be assessed as explicit end-user surcharges.

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**TIME WARNER COMMUNICATIONS HOLDINGS, INC.**
**OPPOSITION TO AND COMMENTS ON PETITIONS**
**FOR RECONSIDERATION AND CLARIFICATION OF REPORT AND ORDER**

A number of parties have requested the Commission to reconsider or clarify aspects of its Report and Order in CC Docket No. 96-45 (released May 8, 1997), summarized, 62 Fed. Reg. 32,862 (June 17, 1997), recon. in part, FCC 97-246 (released July 10, 1997)("Report and Order"), which adopted rules necessary to implement Section 254 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)("1996 Act"). Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, Time Warner Communications Holdings, Inc. ("TW Comm") respectfully submits this response to certain of those petitions for reconsideration.

## I. Eligibility for Federal Universal Service Support Pursuant to Section 214(e)(1)(a)

The Commission should reject any requests to revise the policies adopted in the Report and Order in order to extend universal service support to entities that do not incur the costs related to providing universal services. As TW Comm emphasized in its Petition for Reconsideration of the Report and Order, the Commission accurately concluded that a basic principle necessary to achieve universal service goals is that universal service support should

be allocated to the carrier that incurs the costs of providing the relevant services. The Commission's rationale for adopting this principle is sound:

> Under section 254(e), eligible telecommunications carriers are to use universal service support for the provision, maintenance, and upgrading of facilities and services for which the support is intended. When a line is served by an eligible telecommunications carrier, either an ILEC or a CLEC, through the carrier's owned and constructed facilities, the support flows to the carrier because that carrier is incurring the economic costs of serving that line.[1]

In accordance with the principle that the carrier that incurs the costs of providing the relevant services should receive the related universal service support, the Commission should not adopt the Kansas Corporation Commission's ("KCC") recommendation that it extend universal service support (specifically, Lifeline discounts) to resellers.[2] The Commission responded to similar arguments in the Report and Order, noting that the Local Competition Order[3] provides that all retail services, including below-cost and residential services, are subject to wholesale rate obligations under section 251(c)(4). As a result, the Commission concluded that resellers "could obtain Lifeline service at wholesale rates that include Lifeline support amounts and can pass these discounts through to qualifying low-income consumers."[4]

Also in accordance with the principle that the carrier that incurs the costs of providing

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[1] Report and Order at ¶ 286 (footnote omitted).

[2] Kansas Corporation Commission Petition for Reconsideration, pp. 1-3 (July 17, 1997).

[3] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996), vacated, in part, Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir. decided July 18, 1997).

[4] Report and Order at ¶ 370 (footnote omitted).

the relevant services should receive the related universal service support, the Commission should revisit its decision to extend eligibility for universal service support to certain carriers that do not incur the costs associated with providing universal services. A number of entities, including the Western Alliance[5], Sprint Corp. ("Sprint")[6], US West, Inc. ("US West")[7], and the Rural Telephone Coalition ("Coalition")[8], asked the Commission to reconsider its conclusions on the level of facilities a carrier must provide in order to satisfy Section 214(e)(1)(A)'s facilities requirement. Specifically, those parties and TW Comm recommended that the Commission revise its determination that Section 214(e)(1)(A)'s facilities requirement may be met through the de minimis use of a carrier's own facilities or of unbundled elements.

As Sprint recognized, the Report and Order's definition of the level of facilities required to satisfy the facilities requirement of the Act means that,

> a CLEC can qualify for USF support if it resells ILEC basic services, but provides its own operator services (as, indeed, some CLECs are currently doing). The result would be to both undermine the Commission's determination that USF support should not be afforded to resellers and to place the underlying facility carrier at significant financial risk.[9]

Moreover, as the Western Alliance emphasized, the Commission's conclusion that a carrier

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[5] Western Alliance Petition for Reconsideration, pp. 21-23 (July 17, 1997).

[6] Sprint Corp. Petition for Reconsideration, pp. 3-4 (July 17, 1997).

[7] US West, Inc. Petition for Reconsideration, pp. 15-19 (July 17, 1997).

[8] Rural Telephone Coalition Petition for Reconsideration and Clarification, pp. 13-18 (July 17, 1997).

[9] Sprint Corp. Petition for Reconsideration at 3-4.

could satisfy Section 214(e)'s facilities requirement and qualify as an eligible telecommunications carrier by relying on its own facilities only to provide access to operator services and obtain the remaining services designated for support from another carrier and offer them through resale, disregards Congressional intent.

> Congress unequivocally required a carrier to 'own facilities' as a condition of eligibility for Universal Service support under Section 214(3)(1), and thereby established just such a barrier in order to assure the continued viability of Universal Service, encourage investment in telecommunications infrastructure, and prevent cream-skimming.[10]

US West also recommended that the Commission reconsider its definition of the level of facilities necessary to qualify as an eligible telecommunications carrier. US West suggested that eligibility for high cost support should be extended to those carriers that purchase unbundled loops or rely on their own loops to provide service.[11] However, US West's Petition for Reconsideration pointed out that although competitive local exchange carriers ("CLECs") that purchase and use unbundled loops should be entitled to participate indirectly in high cost support, the potential for arbitrage exists if the high cost support is targeted based upon a small geographic area while unbundled loop costs are averaged over a larger area. US West's Petition for Reconsideration set forth a methodology for the Commission to implement its recommendation on eligibility. US West suggested that the FCC adopt the following approach:

> (1) determine the unbundled loop price through negotiation or state commission arbitration;

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[10] Western Alliance Petition for Reconsideration at 23.

[11] US West, Inc. Petition for Reconsideration at 16.

(2) determine the total amount of targeted high cost support which will be available for all geographic areas within the state (by census block groups or wire centers) and divide this amount by the total number of lines within the state to get an average per-line support for the state; and

(3) subtract the average per-line support from the unbundled loop price to obtain the support-adjusted unbundled loop price.

TW Comm supports US West's recommendation that the Commission reconsider its determination on the level of facilities necessary to qualify as an eligible telecommunications carrier. TW Comm does not oppose adoption of eligibility criteria that would limit eligibility for universal service support to those carriers that either purchase unbundled loops or rely on their own loops to provide service, but recommends that the FCC modify US West's proposal to distinguish between high cost unbundled loop and non-high cost unbundled loop prices. US West's algorithm should only apply to the universe of high cost areas. Otherwise, carriers serving non-high cost areas would receive an average level of support in the adjusted prices of unbundled loops. Any mismatch and the arbitrage that may result from CLECs that purchase and use unbundled loops may not be effectively minimized by adopting US West's methodology. Implementation of US West's proposal without incorporating revisions to distinguish between high cost loops and non-high cost loops will result in support being indirectly received by carriers that do not serve high cost areas.

## II. Commission Jurisdiction over the Interstate Fund

### A. The Commission properly concluded that the criteria in Section 214(e), rather than criteria developed by state public utility commissions, should govern eligibility for federal universal service support.

TW Comm opposes arguments made in the Texas Public Utility Commission's[12] ("Texas PUC's") and the Florida Public Service Commission's[13] ("Florida PSC's") Petitions for Reconsideration that the FCC's preemption of state regulations and policies on eligibility criteria for federal universal service support exceeds its authority. Section 214(e)(2) authorizes a state to determine whether a particular carrier meets the eligibility requirements for federal funding set forth in Section 214(e)(1) as well as to designate a carrier that meets those requirements as an eligible telecommunications carrier for a particular service area. However, Section 214(e) leaves to the FCC the responsibility to define the exact parameters of Section 214(e)(1)'s eligibility requirements for federal funding. The Commission accurately interpreted Section 214(e) for these purposes as follows:

> Section 214(e)(2) further states that '. . . the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1).' Read together, we find that

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[12] Public Utility Commission of Texas Petition for Reconsideration, pp. 8-9 (July 15, 1997).

[13] Florida Public Service Commission Petition for Clarification and Reconsideration, pp. 2-3 (July 17, 1997).

> these provisions dictate that a state commission must designate a common carrier as an eligible carrier if it determines that the carrier has met the requirements of section 214(e)(1).[14]

The Florida PSC's Petition for Reconsideration argues that "the FCC is not authorized to make legal interpretations relating to state authority in the Act."[15] However, Section 214(e) does not appear to designate to the states the exclusive authority to establish eligibility criteria for federal funding. Rather, it appears that the Commission appropriately adopted eligibility criteria to implement Section 214(e)(1) of the 1996 Act while recognizing that under Section 214(e)(2), state commissions will make determinations on whether particular carriers satisfy Section 214(e)(1)'s federal eligibility requirements (as interpreted by the FCC). The Report and Order did not reach any conclusions on the procedure a state commission should follow to determine whether a particular carrier satisfies Section 214(e)(1)'s eligibility requirements for the federal fund and did not otherwise interfere with the states' authority under Section 214(e)(2).[16]

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[14] Report and Order at ¶¶ 135-36 (footnote omitted)(emphasis in original).

[15] Florida PSC Petition for Clarification and Reconsideration at 2.

[16] Moreover, Section 254(f) of the 1996 Act expressly recognizes that Section 214(e)'s eligibility criteria only applies to the federal fund. 1996 Act at § 254(f). In the Report and Order, the Commission recognized that state adoption of "a second set of eligibility criteria for a state universal service mechanism would have no effect upon the statutory eligibility criteria for the federal universal service mechanisms." Report and Order at n.329.

The FCC should not consider the Florida PSC's[17] opposition to the Commission's reliance on Section 253 of the 1996 Act to support its interpretation of Section 214(e).[18] If the states imposed additional requirements that carriers must meet before they could become eligible for federal universal service support, it is possible that such state eligibility criteria could serve as barriers to competition by impeding competitive entry into certain high cost markets.

It is possible to interpret the scope of the Commission's authority under Section 253 broadly. After emphasizing that "the majority of States restrict full and fair competition in the local exchange, either by statute or through the public utility commission's regulations[,]"[19] Congress included specific provisions in the 1996 Act to accomplish the 1996 Act's central objective - to foster competition. One such provision, Section 253, confers to the FCC the power to preempt state and local requirements that impede entry into telecommunications markets.

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.[20]

To ensure that no state or local practice would have the effect of prohibiting the ability of an entity to provide a telecommunications service, Section 253 authorizes the Commission to

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17 Florida PSC Petition for Clarification and Reconsideration at 4.

18 Report and Order at ¶ 136.

19 H.R. Rep. No. 104-204, at 50 (1995), reprinted in 1996 U.S.C.C.A.N. 10,13.

20 See 1996 Act at § 253(a).

preempt such practices.[21]

In part, Section 253 seeks to prevent state actions that constitute barriers to entry for telecommunications service providers. Pursuant to antitrust principles, the term "barriers to entry" is often construed liberally.[22] In effect, barriers to entry, "[i]nsulate the existing firms from competition by potential new entrants."[23] A barrier to entry need not serve as a complete bar to entry. Rather, a barrier to entry may serve to protect the incumbent provider from competitors, as state public utility commission eligibility requirements regarding eligibility for federal universal service support could do.

Conceivably, a carrier that meets the statutory definition of an eligible telecommunications carrier could be barred from entering certain markets if under state requirements, it did not qualify for federal universal service support. Under such a scenario, the state eligibility requirements could be considered to be a barrier to market entry and subject to preemption under Section 253 of the 1996 Act.

There appears to be little support for the Florida PSC's argument that Section 253 is misapplied in this instance because Section 253 is designed to focus on a particular "state statute, regulation or legal requirement". [24] As discussed above, the scope of the

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[21] Id. at § 253(d).

[22] Richard A. Posner & Frank H. Easterbrook, 513 Antitrust, 2d ed., 1981. See Herbert Hovenkamp, 305 Economics and Federal Antitrust Law, 1985; Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1439 (9th Cir. 1995), cert. denied, 116 S.Ct. 515 (1995).

[23] Richard A. Posner & Frank H. Easterbrook, 513 Antitrust, 2d ed., 1981.

[24] Florida PSC Petition for Clarification and Reconsideration at 4.

Commission's authority under Section 253 could be interpreted as broad. Even if Section 253 could be construed to require the FCC to focus on a particular requirement, one could argue that the Commission did focus on particular requirements in this instance. The Commission identified specific state requirements that are preempted - additional eligibility requirements for federal universal service support. Moreover, one could argue that in this docket, a rulemaking proceeding subject to public notice and comment, the FCC provided notice and comment of its intention to preempt these requirements.

### B. Federal funding should not be extended to intrastate services unless the assessment of the support is extended to include intrastate revenues.

TW Comm opposes the Western Alliance's[25], the Texas PUC's[26], and the Coalition's[27] recommendation that the FCC reconsider its decision to limit the federal share of universal service support to 25% of the universal service support system. Federal funding should not be extended to intrastate services at a level that will far exceed that which has historically been funded if assessment of such support is restricted to the much smaller base of interstate-only revenues. As the Commission recognized, it is necessary to limit the federal share of universal service support to a relatively small percentage such as 25% because the FCC chose to base federal support on interstate-only revenues.

> We have adopted this approach because the Joint Board did not recommend that we should assess intrastate as well as interstate revenues for the high cost support mechanisms and because we have every reason to believe that the states will participate in the federal-

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[25] Western Alliance Petition for Reconsideration at 18-21.

[26] Texas PUC Petition for Reconsideration at 2.

[27] Coalition Petition for Reconsideration and Clarification at 1-6.

> state universal service partnership so that the high cost mechanisms will be sufficient to guarantee that rates are just, reasonable, and affordable.[28]

If the Commission reconsidered its conclusion to limit the federal share of universal service support to 25% and increased the federal share of universal service support, it is likely that the vast majority of the funding burden would continue to be allocated to a single class of telecommunications carrier. Further, interstate carriers which derive a much larger share of their revenue from intrastate services, principally ILECs, would be responsible for a smaller share of support for intrastate services than other carriers (most likely including their competitors). This scenario raises serious questions about whether such a policy could satisfy the competitive neutrality principle adopted in the Report and Order. Such a policy may also violate the Report and Order's principle that the carrier that incurs the costs should receive the related universal service support. Thus, it is not clear that the financial burden imposed on the states as a result of the FCC's conclusion to limit the federal share of universal service support to 25% is "improper" as the Western Alliance argues[29] or "unlawful" as the Coalition suggests.[30] Instead, limiting the federal share of universal service support to 25% may be necessary to ensure that the funding base "matches" the funded services. Put simply, in order to be consistent with its decision to rely on interstate revenues only for federal universal service support, it may be appropriate for the Commission to limit the federal share of universal service support to 25%.

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[28] Report and Order at ¶ 268.

[29] Western Alliance Petition for Reconsideration at 18.

[30] Coalition Petition for Reconsideration and Clarification at 1-6.

## III. Contributions to Universal Service Support Programs Should be Assessed as Explicit End-User Surcharges

TW Comm concurs with US West's recommendation that contributions to universal service support programs should be assessed as explicit end-user surcharges.[31] The Commission should reconsider its decision that carriers should recover their contributions from the carrier common line basket and instead, consider requiring contributors to collect the funds as a surcharge based upon and reflected in end users' retail bills for both intrastate and interstate services. As US West suggests, assessing contributions as a surcharge may

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[31] US West, Inc. Petition for Reconsideration and Clarification, pp. 9-10.

obviate the need for carriers to change their access rates as a result of fluctuations in their support obligations.

Respectfully submitted,

**TIME WARNER COMMUNICATIONS HOLDINGS, INC.**

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Dated: August 18, 1997

## CERTIFICATE OF SERVICE

I, Catherine P. McCarthy, hereby certify that a true and correct copy of the foregoing Opposition and Comments to Petitions for Reconsideration and Clarification of Time Warner Communications Holdings, Inc. was served, this 18th day of August, 1997, via hand-delivery or First Class Mail, as indicated, upon each of the parties on the attached service list.

Catherine P. McCarthy

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